IN THE

Supreme Court of the United States

October Term, 1960

No. ———

LEWIS LLOYD ANDERSON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Court of Appeals.

Citations to Opinions Below

The opinion of the Alabama Court of Appeals is reported in 120 So. 2d 397, and is set forth in the Appendix hereto, *infra*, p. 1a. The opinion of the Supreme Court of Alabama is reported in 120 So. 2d 414, and is set forth in the Appendix hereto, *infra*, p. 35a.

Jurisdiction

The judgment of the Alabama Court of Appeals was entered on November 10, 1959. R. 210-242; Appendix p. 1a *infra*. A petition to the Supreme Court of Alabama for writ of Certiorari was denied on March 17, 1960, R. 257, and application to the Supreme Court of Alabama for rehearing was overruled on May 19, 1960, R. 259. The jurisdiction of this Court is invoked pursuant to 28 United

States Code, Section 1257(3), petitioner having asserted below, and asserting here, the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States.

Question Presented

Whether the practice of the Dallas County, Alabama, Jury Commission in selecting Negroes for the Jury Roll results in the arbitrary and systematic exclusion of Negroes on racial grounds from both grand and petit juries in this case, contrary to the equal protection clause of the Fourteenth Amendment.

Constitutional Provision Involved

This case involves the following constitutional provision:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

The judgment of the Alabama Court of Appeals, Second Division, entered in this case on November 10, 1959, affirmed a judgment and sentence of the Circuit Court of the Fourth Judicial Circuit in and for Dallas County, Alabama, adjudging the petitioner guilty of first degree manslaughter, and sentencing the petitioner to ten years' imprisonment.

Execution and enforcement of the judgment of the Alabama Court of Appeals was stayed on May 27, 1960, by Presiding Judge of the Alabama Court of Appeals Robert G. Harwood, "for 90 days from the 19th day of May 1960, to enable appellant (petitioner) herein, to apply for and obtain, if he can, a review of said cause by the Supreme Court of the United States, . . ."

The circumstances leading up to this judgment are as follows:

The petitioner, a Negro minister, owned a 1956 Black Lincoln Premier (R. 96, 113, 121, 155). On January 20, 1959, while driving along a street in Selma, Alabama, he struck and killed one Tom Reese. As a result, he was indicted by a Dallas County grand jury for Murder in the 2nd degree, which true bill included the lesser charges of voluntary and involuntary manslaughter. The petitioner entered a plea of not guilty (R. 3).

No Negro has ever served on a petit jury in Dallas County, and only one Negro reportedly ever served on a Dallas County grand jury. For this reason, petitioner, prior to trial on the merits, filed a motion to quash the indictment on the ground that Negroes were systematically excluded from grand jury service in Dallas County solely because of their race and color. The motion included allegations that no Negro had served on the grand jury which had indicted him although Negro males qualified under the state law to serve outnumbered qualified whites. Petitioner declared that the methods followed by the Jury Commission of Dallas County in selecting the names of Negroes to be placed on the jury roll was highly irregular, arbitrary and contrary to the method prescribed by the laws of the State of Alabama and the Constitution of the United States (R. 3-5). Petitioner also filed a motion to quash the venire (R. 7), and later filed a motion to declare void the composition of the jury sworn to try the defendant, both on the constitutional allegations of systematic exclusion of Negroes from jury service (R. 9).

To prove racial discrimination, the petitioner introduced the 1950 Federal Census reporting 6,940 male whites over twenty-one years of age in Dallas County, Alabama, and 7,956 male Negroes over twenty-one years of age in Dallas County (R. 55). The Solicitor for the Fourth Judicial Cir-

cuit which includes Dallas County, admitted that since h took office in 1954, no Negroes have served on the grand juries which are organized twice a year (R. 28-29). The Solicitor also testified that each venire contains about 7(names, that an average of six or seven of these are Negroes and that while some of these ask to be excused, names of the others are placed in the hat from which the grand jury is drawn (R. 29-30). He reported (R. 30-31) that to his knowledge there were five Negroes on the venire drawn for the trial of this case, two were excused for illness, one claimed an over age exemption, and two remained on the venire. No Negro served on the grand jury in this case.

Two other court officials admitted that they could not recall any Negroes having served on a grand jury, while a third, a Deputy Circuit Solicitor, could recall only one Negro whom he believed had served on a grand jury in 1954 (R. 33). The Circuit Clerk, who served from 1950 to 1953 as secretary to the jury Commission, could not recall any Negroes ever serving on grand juries. She maintained, however, that there was no racial identification on the jury cards (R. 31-32).

Five Negroes who were long-time residents of Dallas County and eligible for jury service, reported that they had never served on any jury and knew of no Negroes who had performed jury service (R. 35-37, 41-44, 48-52). One man held an M.A. degree, Phi Beta Kappa membership, and had lived in Dallas County for 65 years. On cross-examination, the State pointed out that this witness until the age of 60 had been a teacher and thus exempt from jury service (R. 36).[1] The Chairman of the Dallas County Jury Commission reported that the Commission followed

[1] Among the classes of persons exempt from jury service under Alabama law unless by their own consent are: "teachers while actually engaged in teaching;" Tit. 30 Ala. Code of 1940, §3 as amended.

a policy of not placing the names of exempt persons on the jury roll (R. 61), but petitioner introduced the jury list for the February 23, 1959 term of court, which list contained the name of one "W. David Holladay, Preacher and Teacher" who had been called for the present session of the court (R. 37-39). The record indicates that Mr. Holladay was white. The Jury Commissioner admitted as much, but explained that the white preacher-teacher's name had been placed on the roll "by mistake" (R. 61).

The Jury Commission chairman, who had held his post since 1954, stated that he thought that there were 1800 names on the jury roll, but also admitted that only one out of twelve was a Negro (R. 46). He said that in obtaining names for the jury rolls, both Negro and white prospective jurors were interviewed, and that he relied on recommendations of citizens who were "high class folks in various parts of the County, . . ." (R. 47).

He reported that he talked to persons all over the county about prospective jurors, and that in those precincts where he didn't know the Negroes, he would "ask some good white man" who [illegible] suggest names (R. 61-62).

He also reported that of those persons he checked, the ratio between whites and colored who had been convicted of crime was "eight or ten to one in favor of the whites" (R. 60). The Sheriff of Dallas County also estimated that 85% of the arrests he made were Negroes, although he admitted that some were repeaters, and that he did not mean to indicate that 85% of the total Negro population were criminals (R. 57-59). There was no evidence concerning what proportion of the Negro population had been convicted of crime.

The State called a witness who reported serving on a grand jury in Dallas County during January 1954, at which time one Negro also served on the grand jury (R. 56).

After hearing the testimony and considering the evidence offered by petitioner and the state regarding the above motions, the trial court overruled them (R. 6, 8, 10). On appeal in the Alabama Court of Appeals this point was again urged and it was held that the petitioner failed to carry the burden of proving that there was any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excluded or limited the number of Negroes available for jury service in Dallas County, Alabama (R. 242).

The Alabama Court of Appeals in determining that petitioner failed to prove that there was any scheme which excluded or limited the number of Negroes available for jury service in Dallas County, referred to the Supreme Court of Alabama's opinion in *Fikes* v. *State*, 263 Ala. 89, 81 So. 2d 303, reversed, 352 U. S. 191, "to call attention to the fact that the jury commission of Dallas County made up a new roll of jurors in October 1953, so that no exclusion before that date would have any relevancy here" (R. 218), and further considered that opinion for a finding as to the make up of the jury roll in October of 1953:

> ". . . The Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, . . ." (R. 219).

The Alabama Court then concluded that except for the adding of names of men newly qualified, and the deletion of those who have died or become disqualified, as required annually by statute, the basic makeup of the jury roll would not be changed. (R. 219).

How the Federal Questions Were Raised and Disposed of

The federal question concerning the right to be indicted by a grand jury and tried by a petit jury from which members of the petitioner's race have not been arbitrarily and systematically excluded because of their race or color was properly raised before the Alabama Court of Appeals and disposed of adversely to petitioner's contentions. This is demonstrated in the opinion of the Alabama Court of Appeals (R. 218-242) and is largely described by the following quotation:

> "We feel all and all in balance that Anderson has failed to carry the burden of proof that there is any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excludes or limits the number of Negroes available for jury service in Dallas County, Alabama."

The issue of racial discrimination in jury selection as prohibited by the equal protection clause was first raised prior to the trial at which time petitioner submitted motions to quash the indictment (R. 4-5), quash the venire (R. 7), and to declare void the composition of the jury as sworn (R. 9). The trial court overruled each of these motions (R. 6, 8, 10). Following the verdict, petitioner submitted a motion for a new trial (R. 18-19). Paragraphs 8, 10, 12, 13 and 14 of this motion alleged deprival of the equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution in that petitioner was indicted and tried by juries from which members of his race were arbitrarily and systematically excluded because of their race or color as set forth therein in some detail. This motion for a new trial was overruled and exception

was made thereto (R. 19-20). A writ of certiorari by petitioner to the Supreme Court of Alabama (R. 246-249), specifically raising the jury discrimination point, was denied (R. 257), and his application for rehearing to the Supreme Court of Alabama (R. 258), was overruled (R. 259).

Reasons for Granting the Writ

Writ of certiorari to review the judgment of the Alabama Court of Appeals should issue because it has decided substantial federal constitutional questions contrary to applicable decisions of this Court.

I. The grand and petit juries which indicted and convicted petitioner of first-degree manslaughter were bodies from which members of the Negro race were arbitrarily and systematically excluded by the jury Commission of Dallas County through the use of a policy which resulted in no Negro serving on a petit jury, and only one Negro serving on a grand jury during a seven year period.

II. A matter of vital importance to the public is presented since the policy and practices under which juries are selected in Dallas County, Alabama, by their operation and their result, reveal a scheme to follow the word and evade the spirit of decisions of this Court prohibiting the systematic exclusion of Negroes from jury service because of their race or color.

I

The testimony in this case shows that petitioner has made out and supported his charge of systematic exclusion of Negroes from jury service in Dallas County. No Negro has ever sat on a petit jury and only one Negro has

served on a grand jury since 1953, when a new jury roll was prepared, allegedly without regard to race.[2]

There are almost 8,000 male Negroes over 21 years of age in Dallas County, many of whom must be presumed qualified for jury service. But no more than 150 of them are presently listed on the jury roll.[3] The venires drawn in Dallas County generally contain at least 70 names, but jury commission personnel testified that the number of Negro names drawn for each venire varies between five and eight.

Petitioner submits that it was on just such a showing in *Reece* v. *Georgia*, 350 U. S. 85, 88, that this Court concluded:

> "This evidence, without more, is sufficient to make a strong showing of systematic exclusion. The sizable Negro population in the county, the fact that all-white juries had been serving for as long as witnesses could remember, and the selection on the jury list of a relatively few Negroes who would probably be disqualified for actual jury service all point to a discrimination 'ingenious or ingenuous.' Smith v. Texas, 311 U. S. 128."

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[2] The opinion in *Fikes* v. *Alabama*, 81 So. 2d 303, 309, confesses that "There had been only a small number of Negroes on previous rolls. Probably they had been systematically left off such rolls on account of race."

[3] Testimony was given by five Negro residents of Dallas County including a minister, a mechanic, teacher and a businessman, each of whom was not only qualified for jury service, but by virtue of profession and activities, would most likely have heard of Negroes who had actually served. Each said that they had never served on any County Jury, nor had they known of any Negro who had served.

There are similar statements in several other cases.[4] In each of these cases, the Court held that, on such facts, a *prima facie* case of race discrimination was established which the state had the burden of rebutting.

In the *Reece* case, *supra*, a showing of no Negro service on the grand jury list caused the Court to conclude that "petitioner's motion stated and his evidence supported a *prima facie* constitutional claim." 350 U. S. at 88. In *Hill* v. *Texas*, 316 U. S. 400, no Negro service on the grand jury in a county with a high percentage of literate Negroes resulted in a finding that "we think petitioner made out a *prima facie* case, . . ." 316 U. S. at 404. In *Pierre* v. *Louisiana*, 306 U. S. 354, 351, similar evidence by petitioner "created a strong *prima facie* showing that Negroes had been systematically excluded—because of race—from the grand jury and the venire from which it was selected."

The State totally failed to show that the long history of all white petit juries and, with one lone exception, all white grand juries in Dallas County was not the result of a policy and practice of the Jury Commission resulting in the systematic exclusion of Negroes from the jury roll.

The State statutes under which the Jury Commission functioned left little doubt as to their duty:

> "The clerk of the jury commission shall, under the direction of the jury commission obtain the names of every male citizen of the county over twenty-one . . ." Tit. 30, Section 18, Ala. Code of 1940, as amended.
>
> "The jury commission, . . . shall make in a well bound book a roll containing the name of every male citizen living in the County who possessed the qualifi-

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[4] *Hill* v. *Texas*, 316 U.S. 400, 401-403; *Pierre* v. *Louisiana*, 306, U.S. 354, 351; *Neal* v. *Delaware*, 103 U.S. 397.

cations herein prescribed . . ." Tit. 30, Sec. 20; Ala. Code of 1940 as amended.[5]

"The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment;" Tit. 30, Sec. 21, Ala. Code of 1940, as amended.

In the face of these clear statutory commands, and notwithstanding census figures showing almost 8,000 male Negroes over 21 in Dallas County, the Chairman of the Jury Commission testified that there were around eighteen hundred names on the jury roll, of which number only one in twelve are non-white.[6] That the Jury Commission Chairman did not believe that most Negroes in Dallas County were qualified is clearly inferrable both from the small number of Negroes on the Jury role, and from his testimony, particularly his admission that in those areas where he did not know any Negroes, he relied on the advice of "a good white man" in selecting names of Negro jurors. It is this form of discrimination which "can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve," *Hill* v. *Texas*, *supra* at 404.

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[5] Section 20 has the effect of requiring that the name of every male citizen possessing qualifications described to serve as a juror and not exempt by law from jury duty be placed on the jury roll and in the jury box each year. Rep. Atty. Gen., 1936-38, p. 355.

[6] Compare with the opinion in *Fikes* v. *State*, 81 So. 2d 303, reporting that "the Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes. . . ." The testimony here thus indicates that since 1953, not only have no additional names of Negroes been placed on the jury roll in Dallas County, but that from 100 to 150 names have been removed.

The State made much of the fact that on each venire drawn in Dallas County there are listed from five to eight Negroes, some of whom ask to be excused. The petitioner submits that the very uniformity of the Negro representation on the venire smacks of the form of "proportional representation" held invalid in *Cassell* v. *Texas*, 339 U. S. 282, 287; *Shepherd* v. *Florida*, 341 U. S. 50.

The State also elicited testimony from the Sheriff and other Dallas County law enforcement officers to the effect that a high percentage of the arrests made in the County were of Negroes. The Alabama Court of Appeals, without further evidence as to how many Negroes have been arrested, or how many Negroes have been excluded for this reason, interpreted the testimony as, in part, justifying the absence of Negroes on the County's juries. However, such testimony falls far short of explaining why not even one Negro has ever served on a petit jury, and why only one Negro has served on a grand jury.

The procedure employed here is quite similar to that held invalid by this Court's ruling in *Cassell* v. *Texas*, *supra*. There Mr. Justice Reed found that it was not hard to ascertain an individual's qualifications for jury service, and that it was reasonable to assume that a large portion of the Negroes of Dallas County had the statutory requirements for jury service. He held that it was the duty of the Commissioners to familiarize themselves fairly with the qualifications of the eligible jurors of the County without regard to race or color.

II

The issue posed by this case is of vital public importance and makes necessary a decision by this Court as to whether the force and effect of its earlier decisions prohibiting the exclusion of Negroes on juries may now be

circumvented by complex schemes, valid on their face, but administered in a manner resulting in either the complete exclusion of Negroes from juries, or their appearance in carefully controlled token numbers.

In a long line of decisions since *Strauder* v. *West Virginia*, 100 U. S. 303, this Court has reversed state criminal convictions because of systematic exclusion of the defendant's race from grand and petit juries. As a result, many communities have sought to amend their jury selection laws, rules and practices so as to mask their continuing practice of excluding Negroes from jury service with a heavy coat of *de facto* compliance with the constitutional standard.

In the past, this Court has found in even the most ingenious of these schemes the same fatal defect present in the case here: the insufficiently explained reason as to why in a county where at least 53 per cent of the eligible Negroes are potentially qualified for jury service, there is a steadily decreasing number of Negroes listed on the jury roll, only a token number of whom have been listed on each venire, and only one of whom has served over a period of several years.

Here, as with many other cases of jury discrimination heard by this Court, the statutory scheme is not in itself unfair, and is capable of being carried out with no racial discrimination whatsoever, but as was the situation in *Smith* v. *Texas*, 311 U. S. 128, 131, "by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable."

Clearly, the Constitution entitles petitioner to more than the Jury Commissions' protestations of impartial selection

of jurors in Dallas County. *Reece* v. *Georgia*, 350 U. 85; *Hernandez* v. *Texas*, 347 U. S. 475. As was said *Smith* v. *Texas*, *supra* at 130, "The Fourteenth Amen ment requires that equal protection to all must be given- not merely promised."

Therefore, the petitioner maintains that if they are have meaning, his rights under the equal protection claus must exceed merely prohibiting jury officials from placin only the names of whites on the jury list, by statut *Strauder* v. *West Virginia*, *supra*, or by policy, *Neal Delaware*, 103 U. S. 370; or placing Negroes' names on th list in such a manner as to make them easily identifiabl *Avery* v. *Georgia*, 345 U. S. 559; or limiting to one th number of Negroes on each grand jury, *Cassell* v. *Texa supra*.

Not only the petitioner, but all Negroes and the publ in general will be affected by the Court's decision in th case. At issue is this Court's willingness to continue i suring the right of a Negro to be indicted and tried b juries from which the cloud of arbitrary exclusion is e tirely removed. This cloud is not removed by placing small percentage of the eligible Negroes on the jury lis while alleging that the great majority are criminals or i otherways are incapable of performing the duties of juror. Nor, it is submitted, can this cloud be dispelled b somehow drawing a predictable handful of Negroes on ea venire, all but one of whom, by reason of chance, illne or easily obtained excuse, has failed to actually serve.

It is therefore clear that the decision of the Alaban Circuit Court of Appeals would sentence petitioner imprisonment in denial of the equal protection of the law

CONCLUSION

WHEREFORE, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Alabama Court of Appeals

LEWIS LLOYD ANDERSON

—v.—

STATE.

2 Div. 16.

Court of Appeals of Alabama.

Nov. 10, 1959.

Rehearing Denied Dec. 1, 1960.

* * * * * *

Judgment affirmed.

Certiorari denied, 120 So.2d 414.

* * * * * *

CATES, Judge.

Anderson has appealed his conviction of first degree manslaughter. The verdict also carried ten years' imprisonment.

The first principal point relates to the sufficiency of the evidence, and whether two witnesses were competent to testify as to the speed of an automobile.

A second question is grounded on the allegation that, in Dallas County, Alabama, there was, at the time of indictment (January 29, 1959) and the time of trial (February 27, 1959), a systematic exclusion of Negroes from juries with a consequent denial to Anderson, a Negro, of the equal protection of the law guaranteed him under the State Constitution and under the Fourteenth Amendment to the Constitution of the United States.

[1] Viewed from the verdict (as we must take the facts on appeal, Jones v. State, 33 Ala.App. 451, 34 So.2d 483), the case made by the prosecution was as follows:

On January 20, 1959, prosecution witnesses saw Anderson driving a car along Minter Street in Selma headed east. His speed was between sixty and seventy miles per hour.[1]

Minter was an unpaved street in a well populated residential neigborhood. The defendant testified the weather was "damp" and that Minter "is somewhat of a bad street most of the time but whenever it rains it is a somewhat of a deplorable condition for driving."

When Anderson got to the corner of Church Street, he ran into the front bumper and hood of a green Chevrolet headed north on Church, which had stopped on the south edge of the intersection. The impact spun the Chevrolet to its right 180 degrees from its first heading.

Forward momentum took Anderson's car down Minter Street. It swung first to the right (i. e., to the south side of the street), then caromed to the left off some stone blocks on the north edge of the carriageway. As it began to swing again to the right, it hit Tom Reese who was walking across (or had just crossed) the street and had got at least beyond the middle of the left lane of traffic.[2] The car carried Reese along on its hood for several feet, then after he fell off, it ran over him, all the while swerving again to the right or south side of the street. Then back in the road again, it went on to the end of the block where it hit a tree, bounced four feet in the air and turned over.

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[1] One witness judged that Anderson's speed was about sixty or seventy miles per hour; another stated he was traveling pretty fast; a third, the driver of the Chevrolet, said sixty-five or seventy. The speed limit at the collision corner was fifteen miles per hour.

[2] L. B. Hunter, an eyewitness, said Reese was on the north edge of the roadway alongside the footpath. He further testified the force took Reese out of his shoes.

Reese had both arms and his left leg broken, an open wound ran around his abdomen from his right side and his intestines were outside.

Anderson was indicted for second degree murder. The true bill acted also as a charge of voluntary and involuntary manslaughter.

The defense was to the effect that Anderson had driven all along Minter Street at a moderate speed. He testified he was crossing Church Street at fifteen miles per hour when the Chevrolet driven by Mike Howard came at him. He recalled no more of the happening.

Anderson's physician testified the wreck had caused traumatic retrograde amnesia. The defense implied Anderson probably pressed on the accelerator while he was unconscious.

The State's showing Anderson's driving at high speed on a damp unpaved (and seemingly slick surfaced) street in a well populated area, hitting and running over a pedestrian in the left lane of travel, and the circumstance of the distance of some 396 feet his car went forward after an apparently violent collision, together with the force of its bounce when it hit the tree, made out a prima facie case of that appreciated disregard of the results of wanton conduct from which death ensues, which is one definition of voluntary manslaughter.

[2, 3] Intent to kill is but an alternative ingredient: the same state of mind can be imputed from conduct wanton and reckless toward human life. The likelihood of another's being imperiled by the wanton conduct, no less than actual knowledge, makes for culpability, thus supplying mens rea in voluntary manslaughter. Rainey v. State, 245 Ala. 458, 17 So.2d 687; Gills v. State, 35 Ala.App. 119, 45 So.2d 44. "Wantonness may be predicated upon conduct occurring before a discovery of the peril. * * *" Lawson, J., in Buchanan v. Vaughn, 260 Ala. 482, 71 So.2d 56, 57.

Anderson has cited a number of civil and criminal decisions for the proposition that, for a killing to be first degree manslaughter, where there is no direct evidence that the act was done wilfully, the State must show it was done with consciousness that injury would probably result from the act, and such knowledge cannot be implied from the knowledge of danger, rather there must be a "design" to do wrong, or a reckless indifference or disregard of natural consequences of the act done. We have carefully considered these cases and have noted discussions of them in decisions as late as Nixon v. State, 268 Ala. 101, 105 So.2d 349 (a murder case), and Smith v. State, Ala.App., 109 So.2d 853.

We have concluded that the Rainey case, supra, is still the law and represents a reexamination and a refinement in the law of manslaughter, and one which this court and the lower court are constrained to follow.

Moreover, we consider the Rainey case to be the natural and correct corollary of the principles theretofore developed as to what may evidence intent in voluntary manslaughter. The two following quotations, we believe, will illustrate this development:

> "It is insisted on motion for new trial that there is no evidence of an intent to kill, and, in the absence of such evidence, the defendant cannot be convicted of manslaughter in the first degree. The law governing homicide is not so narrow. If a person knowingly and consciously drives a highpowered automobile at an excessive rate of speed along the public highway, where other vehicles and pedestrians are liable to be and the driver's vision is obstructed by clouds of dust and the sun is shining in his face, and at a point where he must pass a road machine which takes up at least half the road and death results to a pedestrian walking along the highway, a jury would be justified in finding that the offense was manslaughter in the

first degree * * *"—Reynolds v. State, 24 Ala.App. 249, 134 So. 815, 817.

"Without an intent to kill there can be no murder, or manslaughter in the first degree. (Citing case.) It is not required that there be a positive of specific intent to kill to constitute manslaughter in the first degree. (Citing cases.) This for the reason that where an accused's conduct or act of violence which ordinarily in the usual course of events would result in death or great bodily harm to another, and a death does result, the accused must be deemed to intend the probable results of such act, i. e., that he intended to kill. * * *"—Smith v. State, supra [109 So.2d 855].

The statement in the Rainey case has been expressly quoted with approval in the following criminal appeals: Clayton v. State, 36 Ala.App. 175, 54 So.2d 719 (pistol killing); Harris v. State, 36 Ala.App. 620, 61 So.2d 769 (automobile manslaughter); Hanby v. State, 39 Ala.App. 392, 101 So.2d 553 (automobile manslaughter).

[4, 5] Whether or not a motorist has amnesia when striking a pedestrian is ordinarily not a matter to be determined by his testimony alone; rather it is a jury question. People v. Henry, 23 Cal.App.2d 155, 72 P.2d 915. So that, while certain defense witnesses may not have seen Anderson steering his car, the testimony of State witnesses that they did see him, coupled with the presumption of continuity arising from the undisputed fact that he was the driver at the time of the collision, made out a jury question.

[6] Had there been a both-to-blame collision, Reese's death could be laid to Anderson. The cause and effect question under the theory of the defense could still have supported the verdict had the jury chosen to believe that Anderson was driving sixty to seventy miles per hour.

Howard's contributory negligence would not absolve Anderson. Hanby v. State, 39 Ala.App. 392, 101 So.2d 553.

Therefore, we consider that, as a matter of law, the trial judge properly overruled Anderson's motion (made when the State rested) to exclude the evidence. After both sides rested, the defense took no exception to the oral charge, nor did it move for any charge affirmative as to either first or second degree manslaughter. The trial judge charged murder out, both in writing and in his oral direction.

The State produced two witnesses, Frank L. DuBose and Peter Wolff, who were standing on the corner of Minter and Mabry and saw Anderson driving "pretty fast," and that he ran into a stopped car, zigzagged across the street, and hit a tree and turned over. Neither witness noticed the car striking Reese.

Both at the trial and on appeal, a great deal has been made of the lack of testimonial qualifications of these witnesses as competent to express judgment on the speed of Anderson's car. The State brought out that the witnesses had ridden in automobiles. Although neither of them could drive, each had watched speedometers while riding and had seen traffic along city streets.[3] Excerpts from their testimony appear below.

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[3] DuBose on direct:

"Q. And how was he traveling? A. He was going pretty fast.

Q. What kind of car? Was he in a car, or what? A. He was in a car.

Q. A car. You know how to drive a car, don't you? A. No, sir.

Q. You have been riding in cars, have you not? A. Taxis.

Q. Taxis. And you have noticed the speedometer and things of that nature, didn't you? A. Yes, sir.

Q. And can you estimate from your knowledge of automobiles and riding in them, can you estimate the speed an automobile is traveling? A. Riding I can. Riding in them, I mean.

Q. When you look at an automobile and see it traveling can you from your knowledge of the speed of cars, can you

The rule of our decisions is that the speed of an accustomed object is a subject largely of common observation rather than reserved for expert opinion.

[7, 8] As stated in Vredenburgh Saw Mill Co. v. Black, 251 Ala. 302, 37 So.2d 212, 218:

> "It is well settled that the average witness does not have to have expert knowledge to testify to the speed of a vehicle in ordinary or common use. The fact that the witness McKinley had never driven a truck or automobile did not disqualify him from giving testimony as to the speed of the truck. The credibility of the testimony was for the jury."

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estimate the approximate speed that car is traveling when you see it go by? A. Yes, sir."

Wolff on direct:

"Q. Did you ever look at the speedometer to see how fast they were going? A. Yes, sir.

Q. How long have you been riding in cars? A. I couldn't really tell you.

Q. Well, all your life so far as you know? A. Yes, sir.

Q. And you have always paid attention to speedometers, have you? A. Yes, sir. • • •

Q. Did you watch him when he went by you? A. Yes, sir.

Q. Do you have an opinion as to how fast he was driving?

Attorney Hall: We object. There is no proper predicate laid. He is not qualified.

The Court: I overrule the objection. He is not asking how fast; but he wants to know if you have an opinion. Overruled.

Attorney Hall: We except.

The Court: Read the question.

(Thereupon, the Reporter read the last question propounded to the witness.)

Q. Do you have an opinion, yes or no. A. No, I don't.

Q. You did see the car? A. Sixty or seventy.

Q. Did you watch him go on down the road until this wreck took place? A. Yes.

Q. At the time the accident occurred with the green car, was he driving approximately the same rate of speed when he hit that car as when he passed by you? A. Yes, sir."

See also Williams v. Roche Undertaking Co., 255 Ala. 56, 49 So.2d 902.

[9] We consider whatever deficiencies existed in the testimony of these two witnesses were matters of weight and credibility rather than competency.

A further question arose by way of objection to the testimony of the coroner of Dallas County who was not a physician. The objection went to his expressing an opinion as to whether or not the wounds suffered by Reese probably caused his death.

[10, 11] The State brought out that the coroner had observed some seventy-five or more bodies of persons killed by being struck by automobiles. Whether or not this was sufficient qualification is largely addressed to the sound discretion of the trial judge. In view of the full discription of Reese's injuries, we need not go into whether or not the admission of the coroner's testimony over objection was an abuse of the trial judge's discretion, for the circumstances and description of Reese's being hit by Anderson's automobile and the details of his injuries constituted sufficient undisputed evidence from which the jury could have reasonably inferred that the collision caused his death. This result could have been reached without expert testimony.

In Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 972, 2 L.Ed.2d 991, Mr. Justice Black's opinion begins:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws as guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race. * * *"

Appended to this statement is a footnote which contains a number of decisions theretofore rendered by the Supreme Court of the United States on the question. Three of them, in which Texas was the respondent (Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839), provide a reasonably good cross section of systems that have been scrutinized.

In this case we are confronted with what is charged to be a scheme in Dallas County, Alabama, to systematically exclude Negroes from juries, both on grand and petit juries solely because of their being Negroes.

Anderson moved (1) to quash the indictment, (2) to quash the petit jury venire, and (3) to declare void the composition of the jury sworn to try him.

We begin our enquiry by taking notice of the opinion of Mr. Justice Foster, then supernumerary, in Fikes v. State, 263 Ala. 89, 81 So.2d 303, 309, reversed on another ground, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246.

We refer to the Fikes opinion for two reasons. First, to call attention to the fact that the jury commission of Dallas county made up a new roll of jurors in October, 1953, so that no exclusion before that date would have any relevancy here. Second, we consider the opinion for the following finding as to the make up of the jury roll in October of 1953:

> "• • • The commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, and from which the venire was drawn which furnished the grand jury and petit juries here involved. There was nothing on the roll or cards which indicated their race. • • •"

The revision of the jury roll required to be made by statute every year consists primarily of adding names of men newly qualified, and the deletion of those who have died, become disqualified, or come under a statutory exemption. So that the annual book or roll carries over a great many names from a prior year. Therefore, we feel warranted in approaching this question in a case tried some five years after the Fikes trial in relying upon the finding of our Supreme Court in that case as an established foundation.

[12] Moreover, the movant in such a situation carries the burden of proof to adduce enough substantial evidence to reasonably satisfy the trial judge of the existence of a scheme to exclude.

We begin (also referring to Fikes opinion) with some of our jury statutes.

Code 1940, T. 30, § 21, as amended, gives the basic qualifications of jurors: (1) Sex: male; (2) age: 21-65; (3) general: generally reputed to be honest and intelligent * * * and esteemed in the community for their integrity, good character and sound judgment; (4) specific exclusions: (a) under age; (b) habitual drunkard; (c) afflicted with permanent disease or physical weakness rendering him unfit; (d) cannot read English—except freeholder or householder; (e) *ever* convicted of an offense involving moral turpitude. Note: This disqualification is not confined to felons nor to misdemeanants: "offense" includes breaches of ordinances where the substance of the charge involves moral turpitude. Cf. Beasley v. State, 39 Ala.App. 182, 96 So.2d 693 (adultery).

Code 1940, T. 30, § 24, requires the jury commission to seek out men so qualified and put their names on the jury roll and in the jury box.

Code 1940, T. 30, § 28, requires the commission to note disqualifications or exemptions opposite the names of those theretofore on the roll.

Code 1940, T. 30, § 3, as amended, exempts: (1) Judges; (2) attorneys; (3) officers of the United States; (4) officers of the executive department of the state government; (5) sheriffs; (6) deputies; (7) clerks of the courts; (8) county commissioners; (9) physicians; (10) dentists; (11) pharmacists; (12) optometrists; (13) teachers; (14) actuaries; (15) engineers of boats; (16) bus drivers (under Public Service Commission); (17) truck drivers (under Public Service Commission); (18) railroad engineers; (19) firemen; (20) conductors; (21) train dispatchers; (22) bus dispatchers; (23) railroad station agents; (24) telegraph operators; (25) newspaper reporters; (26) embalmers; (27) radio broadcasting engineers and announcers; (28) superintendents, physicians, and regular employees of Bryce and Searcy Hospitals; (29) officers and enlisted men of the national guard and naval militia; (30) and convict and prison guards.

Moreover, the jury commissioners have discretion to exclude men who would be subject to challenge either by statute or by common law for general grounds (aside from those arising from the peculiarities of a given suit, e. g., consanguinity or being a witness).

The statutory grounds of challenge which should keep a man's name from the roll are (Code 1940, T. 30, § 55, as amended):

> "1. That the person has not been a resident householder or freeholder of the county for the last preceding year.
>
> "2. That he is not a citizen of Alabama.
>
> * * * * *

"5. That he has been convicted of a felony.

* * * * *

"8. That he is under twenty-one, or over sixty-five years of age.

"9. That he is of unsound mind."

In Brown v. Woolverton, 219 Ala. 112, 121 So. 404, 406, 64 A.L.R. 640, we find:

"* * * The common-law grounds as far as applicable to our system and not changed by statute remain for our guidance. Our statute has added certain grounds of challenge for cause, but they are not exclusive of the common law remaining unchanged. * * *"

[13] Pardon of an infamous offense does not remove the ground for challenge. Brown v. Crashaw, 2 Bulstr. 154; Terry v. State, 25 Ala.App. 135, 148 So. 157, holds that a pardon will not cut off enquiry as to a witness's conviction of a crime involving moral turpitude. See also Mason v. State, 39 Ala.App. 1, 103 So.2d 337, affirmed 267 Ala. 507, 103 So. 2d 341.

When drawing a venire either for a grand or petit jury, the circuit judge pulls "without selection," i.e., blindly, cards with the jurors' names for the venire list to be summoned by the sheriff. The names of those who appear and are not excused from grand jury duty are drawn in open court from a hat or box. The first eighteen men so picked are the grand jury. Code 1940, T. 30, §§ 30 and 38.

Our statutes require that the cards that go into the jury wheel or box be white, all of the same size and texture. The only writing is the name, occupation, residence and place of business. Code 1940, T. 30, § 20, as amended.

It should be pointed out that no evidence is shown of any violation of any of these or related statutes.

First, Anderson adduced the testimony of the circuit solicitor who had been in office since August, 1954, and who attended the organization of grand juries in Dallas County twice a year. No Negroes had served on grand juries during that time. He had met court in Dallas County four times a year. Each and every venire from which both grand and petit jurors were selected contained a number of Negroes.

The solicitor recalled one case in which all of the Negroes on the venire requested the judge to excuse them. These excuses were granted, with the consequence that their withdrawal left no names of Negroes on the list.

On other occasions when grand juries were drawn, there were Negroes still left on the venire and their names were placed in the hat from which the grand jury was drawn.

Each venire contained an average maximum of seven or eight Negroes, with the normal total of the venire being around seventy summoned, less those who were not found by the sheriff.

On the present venire there were a number of Negroes, one of whom claimed exemption for over age; another, named Tom Waller, was drawn but had to be excused because of an attack; a third was excused on account of illness; and two more were left on.

The circuit clerk was called as a witness and on cross-examination stated that Negroes had been drawn every session of court since she began as clerk. She further testified that there was nothing on the cards drawn from the jury box to show whether the juror was black or white.

The secretary of the jury commission testified her duties were to type up the jury roll as it was given to her, type up the jury cards, write the commission minutes, and post the venire to the jury roll. She had no contact with the venire at all. The jurors were just names to her and there was no way to ascertain from their employment or

addresses, so far as she knew, as to their being black or white. Asked if she knew whether or not Negroes served on any grand jury since she went into her position in September, 1954, her answer was, "Not that I know of." However, it was not brought out that she had knowledge of who did or did not serve on grand juries.

The deputy solicitor was put on the stand and testified that he had been solicitor for "as many as ten, fifteen or twenty" years. During that period of time, he had known of a Negro *serving* once or twice in Dallas County. He stated that none had served in the last three years, including the grand jury which indicted Anderson. On cross-examination he stated that in approximately 1953 or the early part of 1954 there was a Negro who served on the jury at that time.

Anderson took the stand to show that he was a citizen of the city of Selma, Dallas County, Alabama, in the United States.

William H. Dinkins testified he had been a resident of Dallas County since 1894, except when he was in school and in the army. He attended Selma University and Brown University, from which he obtained a B. A. degree. Columbia University conferred upon him a Master of Arts degree. He was a member of Phi Beta Kappa.

Dinkins had never been convicted of any crime in Dallas County, and had never served a penal term in Dallas County. When asked if he had any personal knowledge of any Negroes serving on a jury in Dallas County, he answered, "I don't know anything about grand juries." He was then asked whether he knew of any Negro who had served on the grand jury in Dallas County, to which he answered, "No, sir." A like question as to petit juries was asked, to which he replied, "No." He further testified that he had never served on a grand or petit jury in Dallas

County, nor had he had any occasion of being excused from serving on a venire.

On cross-examination it was brought out that Dinkins was, at the time of the hearing, over age as a juror, aged sixty-eight and a half, and prior to that time had been a school teacher, hence exempt from jury duty under § 3, as amended, supra, at least while teaching.

The solicitor brought out that Dinkins did not know whether a Negro had ever served on the grand jury or not. Dinkins added, "I don't know anything about it."

On redirect examination, Dinkins was furnished a jury list for the February 23, 1959, term of criminal court which contained some sixty-eight names. No question pertinent to the issue raised by the motion was asked Dinkins with respect to this list.

Henry Sylvester Lawson had worked as a mechanic at a cotton seed oil mill and retired. He testified he had never served on a grand jury, but that he had served on a jury in a city court some ten or fifteen years ago. However, further questioning brought out that rather than being a juror, he was in that court in the capacity of a witness.

Lawson did not know any Negroes who had *served* on juries in Dallas County, and he "had just heard tell of some being called but they didn't serve."

John Brown had been summoned for Federal jury duty, but had never served on a State court jury, either petit or grand. When asked if he knew of any Negro who had served on such juries, he answered, "I can't remember. In fact, I haven't been around in court too much."

On examination by the court, it was brought out that Brown did not know whether Negroes had served on juries or not. The Federal venire on which Brown had been called consisted of thirty men, of whom two were Negroes. Brown did not serve on any panel.

The defendant then called the chairman of the jury commission who had been in office since April, 1954. He testified he had participated in preparing the jury rolls in Dallas County, had interviewed prospective jurors, and with the other two members of the commission met and decided when to add names to the list. He had never counted the number on the list. He gave as his estimate that one in ten jurors on the list was a Negro. The total number on the list he guessed at being around 1800.[4] He did not know of the composition of grand juries and petit juries.

In making up the list the chairman of the commission went about to different parts of the county, and where he knew "good men" he asked them about others, and the other commissioners apparently followed the same method. Then the names are entered on the list or roll and each name corresponds with a card that goes in the jury box.

The commissioners interviewed both white and Negro prospective jurors. Not all commissioners went into all precincts; nor did a commissioner, in visiting a precinct, attempt to visit every man over twenty-one years of age; rather the commissioners sought recommendations of persons known to them to be of good standing in each community.

It was brought out on cross-examination that the cards sent by the jury commission to go in the jury box to be drawn by the judge were all similar except for the name of each juror.

L. R. Harrison, a minister, pastor of Mt. Averett Baptist Church and of the True Vine Baptist Church, who had finished his schooling some three years before, testified that he knew of none of the members of his congregation in Dallas County who had served as jurors; nor had he ever served as a juror, nor been excused from

[4] In the Fikes case the ratio seemed to be 1 in 5.

jury service. He had not been convicted of a felony or crime involving moral turpitude, and did not drink or gamble. Furthermore, his father, who was also a minister, had never served as a juror in Dallas County.

James Black, who made his living by logging and owned timber land, testified he was forty-nine years of age; had never been convicted of a felony in Dallas County; had never served a term for more than a year in jail; had never been convicted of anything and given "that term" and given probation; was not an habitual drunkard; did not gamble; had not been arrested for gambling or loitering; could read and write English fairly good; had never served as a juror; had never been called to serve as a juror; did not know of any of his friends who had ever served on a grand or petit jury; nor had he personally been asked to be excused from so serving.

Black had no ailment or crippling disease that might have prevented him from so serving. He was a Mason. He did not know of any members of his lodge who had served as jurors, including the then Master.

On cross-examination Black testified he had never made an effort to find out anything about whether Negroes served on juries or not. He had never checked the list of jurors in Selma newspapers to see if any Negroes were on it. He did not know Roosevelt Dawson. He did know Tom Waller, who ran a dry cleaning plant, but he did not know that Waller had been subpoenaed for jury duty that week. He knew Percy Huckabee, but he did not know that Huckabee had been subpoenaed for jury duty that week. He did not know Young Childers, a farmer, nor did he know Bennie Phillips, who had apparently also been called.

A stipulation was made that the 1950 Federal census showed 6940 white males and 7956 colored males over the age of twenty-one years in Dallas County.

The State then put Terrell Hicks, assistant cashier of a Selma bank, who had served on a grand jury in January, 1954, on the stand. He recalled a Negro by the name of Roosevelt Dawson had served on that grand jury. On cross-examination he stated that he had no personal knowledge of any Negroes serving on a grand or petit jury thereafter. On redirect it was brought out that he had made no attempt to find out about grand juries other than the one on which he served.

The State then produced the sheriff who has held that office since November 8, 1955. We excerpt from his testimony:

"Q. Since November 8, 1955, have you ever served subpoenas when there was not negroes on the jury? A. Not to my knowledge.

* * * * *

"Q. Since November 8, 1955, when you became Sheriff, state the approximate percentage in your best knowledge have been negroes, negro prisoners and white prisoners?

"Attorney Gray: We object, unless he shows the age.

"Q. Over twenty-one years old? A. I will say it has been above eighty-five per cent negro.

"Q. And that includes all crimes? A. All crimes.

"Q. That leaves approximately fifteen per cent that are white. Are most of them Dallas Countians? A. No. I would say a large percentage of them is from Chilton County and some from Craig Air Force Base."

On cross-examination:

"Q. When you testified a moment ago as to the percentage of arrests you have made since you became Sheriff, you meant eighty-five per cent of the total number of arrests you have made have been negroes?

A. That is an estimate. They have been.

"Q. Would you say a large number of negroes you arrest are repeaters? A. To some extent, yes.

"Q. What percentage would you say? A. Well, it would be hard to say. I never tried to arrive at it.

"Q. Using the same judgment you used in arriving at the percentage of negroes, would you give your best judgment of the number who are repeats? A. I would say about the same percentage, number of negroes are repeats as the whites are repeats.

• • • • •

"Q. So you are not saying eighty-five per cent of the total negro population are criminals? Are you not saying they are? A. No; I am not."

Glenn H. Defke, Chairman of the Jury Commission, was recalled and testified:

"Q. Do you know of your own knowledge how many people at Martin's Station precinct, where you lived so long, are on the jury roll? A. I do know, yes, sir.

"Q. Is that the only one you absolutely know? A. Yes. That is the only one I am positive on.

"Q. How many people in that precinct are on the jury roll? A. Seven.

"Q. How many negroes? A. Four.

"Q. The other three are whites? A. That is right.

• • • • •

"Q. Captain, what is the policy of your Commission as to white preachers and white teachers, negro preachers and negro teachers? A. To leave them out of the jury box. If there has ever been one put in, it was an oversight.

"Q. On the list we have now was one man W. David Holloway, Plantersville, and it shows 'Preacher &

Teacher', did you know of your own knowledge when he was put on the list whether he was a preacher and teacher? A. No, sir, I did not.

"Q. And is it your policy to leave them both out? A. Yes.

"Q. Of both races? A. Yes."

On cross-examination:

"Q. Have you talked to negroes in Selma about prospective jurors? A. I have."

Lt. P. L. Pyron, City of Selma Police Department, deposed:

"Q. What is the percentage of the arrests that are colored and what are white? A. Well,—

• • • • •

"Q. Answer the question. A. I would say seventy-five to eighty per cent are negroes."

On cross-examination:

"Q. Are most of the persons you referred to in the seventy-five per cent persons who committed misdemeanors or felonies? A. That includes all arrests, felonies, misdemeanors, and also traffic.

"Q. Would you say traffic violations were a larger portion of that seventy-five per cent? A. Well, I would say fifteen or twenty per cent probably would be traffic.

"Q. And it also includes other petty crimes, classified as misdemeanors, does it not? A. That includes all the arrests."

The clause of the Fourteenth Amendment, § 1, which we consider here, reads:

"• • • No State shall • • • deny to any person within its jurisdiction the equal protection of the laws."

[14] The first and most obvious observation on this prohibition is that the denial must be by an action of the State and that this State action does not embrace denials which work discriminations which are purely private in nature.[5]

With this in mind, we review some of the decisions of the Supreme Court of the United States to find what actions by the States in particular cases were considered to have operated to exclude persons from jury service because of their race or color.

In Strauder v. State of West Virginia, 1879, 100 U.S. 303, 25 L.Ed. 664, judgment was reversed because the West Virginia jury statute provided "all white male persons who are twenty-one years • • • shall be liable to serve as jurors."

In Neal v. Delaware, 1880, 103 U.S. 370, 26 L.Ed. 567, the petitioner in error claimed that the Levy Court which acted as a jury commission purposefully excluded all Negroes from its consideration. This allegation was stipulated to have the effect of evidence. Cf. Hale v. Commonwealth of Kentucky, infra.

Gibson v. State of Mississippi, 1896, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075, was an affirmance of the Supreme Court of Mississippi. It was held that no discrimination was shown to justify removal to the Federal court. Cf. State of Virginia v. Rives, 1876, 100 U.S. 313, 25 L.Ed. 667.

Carter v. State of Texas, 1900, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839, appears to be a procedural decision, in that

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[5] State Action, 1 Race Relations Law Reporter 613. "Private" acts sanctioned by a State are not before us. See comment 34 N.Y.U.L.Rev. 152, and Horowitz, Misleading Search for "State Action," 30 So.Cal.L.Rev. 208.

a motion to quash the indictment was held not to be too late when addressed to the question of exclusion of Negroes from the grand jury. Cf. Michael v. State of Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83, and Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77.

In Rogers v. State of Alabama, 1904, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (reversing judgment under an unpublished opinion, Ala.Sup.Ct., filed July 10, 1903), there was a motion to quash the indictment because the jury commissioners excluded from the grand juror list all colored persons. This decision, too, is a procedural one, inasmuch as the State moved in the trial court to strike the motion to quash, and the motion to quash was stricken from the files.

The Supreme Court of the United States, in effect, said that the motion to quash, though prolix, sufficed to raise the Federal question. It would appear from this case and from the Neal opinion that a mere allegation in conclusionary form is sufficient and the quo modo of the exclusion need not be pinpointed by a defendant.

In Martin v. State of Texas, 1906, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497, the motion to quash the indictment because of exclusion of Negroes from the grand jury was overruled in the trial court. The State had taken issue, but Martin adduced no evidence in support of his motion. The court, per Mr. Justice Harlan, said:

> "• • • The trial court, it must be assumed from the record, had nothing before it, when deciding the motions to quash, except the written motions and the written answers thereto. • • • (200 U.S. at page 319, 26 S.Ct. at page 339)
>
> "• • • The absence of any such proof from the record in this case is fatal to the charge of the accused that his rights under the 14th Amendment were violated." 200 U.S. at page 321, 26 S.Ct. at page 339.

Later cases cite Martin for the proposition that the defendant bears the burden of proof.

Norris v. State of Alabama, 1935, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074, reversing 229 Ala. 226, 156 So. 556. On the motion to quash the indictment returned by the grand jury to the Jackson County Circuit Court, Norris adduced evidence which tended to show that no Negroes had been called for jury service in that county in a long number of years. The books containing the jury roll were produced in court and there was a dispute touching entries therein as to the genuineness of the listing of names of six Negroes. This misprision, the Alabama Supreme Court implied, was the responsibility of the clerk of the board of jury supervisors. The Supreme Court of the United States considered Norris made out a prima facie case that there were qualified Negroes in the county, and that the State had failed to overcome this showing of an exclusion.

Hale v. Commonwealth of Kentucky, 1938, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050, reversing 269 Ky. 743, 108 S.W.2d 716. Hale's motion offered to prove that there were 8,000 Negroes in a population of 48,000, with 700 Negroes on the tax assessor's books as compared to 6,000 white persons. The jury wheel had 500 to 600 names, all of white citizens. Upon the Attorney General's stipulating that the motion could be taken as evidence, it was held that the Commonwealth had failed to overcome the prima facie showing of exclusion arising from the absence of the names of Negroes in the jury wheel.

Pierre v. State of Louisiana, 1939, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757, reversing 189 La. 764, 180 So. 630. Pierre moved to quash the indictment and the general venire from which both grand and petit juries came. The parish population included at least one-third Negroes. The trial judge sustained the motion to quash the petit jury panel and venire, but denied as to the grand jury, taking the

view that the indictment was not evidence of guilt.[6] Under the applicable Louisiana procedure, the jury commissioners pick the names of twenty qualified citizens. From these twenty the judge selects a grand jury foreman and the sheriff draws eleven more. From 1896 to 1936 no Negroes were ever selected by the commissioners.

The petit jury venire for December, 1936, contained the names of three Negroes out of some 300. One of these Negroes was dead, one was misnamed, and one was called for service in 1937. The population of St. John the Baptist Parish was twenty-five to fifty per cent Negro. The court, per Black, J., held that the quashal of the petit jury venire and panel imported evidence sufficient to quash the indictment, and also that the operation of the system of selection made a prima facie showing (unrebutted) that Negroes were systematically excluded from grand juries.

Smith v. State of Texas, 1940, 311 U.S. 128, 61 S.Ct. 164, 165, 85 L.Ed. 84, reversing 140 Tex.Cr.R. 565, 136 S.W.2d 842. Three thousand Negroes met the statutory qualifications for grand jurors. Between 1931 and 1938 only 5 of 384 grand jurors were Negroes. This disparity came from the commissioners putting Negroes last on the list of sixteen names where it was a uniform custom for the court to pick the first twelve names as the grand jury.

The court, per Black, J., remarked:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And

[6] Cf. Rives, J., in United States ex rel. Goldsby v. Harpole, 5 Cir., 263 F.2d 71, citing Jackson, J., dissenting in Cassell v. State of Texas, infra.

from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list."

Hill v. State of Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559, reversing 144 Tex.Cr.R. 415, 157 S.W.2d 369. Like Neal and Martin this is a case hinging on the quantum of proof. After showing there were over 55,000 Negroes in Dallas County, Hill was considered by the Supreme Court to have made a prima facie case of exclusion even after allowing for ineligibility.

No Negro had ever been summoned in some twenty or more years. The jury commissioners claimed lack of personal acquaintance.

The court, per Stone, C. J., rejoined (316 U.S. at page 404, 62 S.Ct. at page 1161):

"* * * The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. * * * Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn

whether there are in fact any qualified to serve. In such a case discrimination necessarily results where there are qualified negroes available for jury service.

• • •"

Akins v. State of Texas, 1945, 325 U.S. 398, 65 S.Ct. 1276, 1278, 89 L.Ed. 1692, affirming 148 Tex.Cr.R. 523, 182 S.W.2d 723. Akins sought to quash the indictment because of an "alleged purposeful limitation on racial representation." Under the Texas practice shown, the trial judge appoints grand jury commissioners who select a list of sixteen persons from which twelve are chosen by the judge.

In this case the commissioners interviewed and chose only one Negro. This Negro the judge empaneled.

This case must be read with Cassell v. State of Texas, infra. In Akins there was a change shown from former complete exclusion. However, this change had not been practiced long enough for a statistical pattern negativing chance to have emerged.

Patton v. State of Mississippi, 1947, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, reversing 201 Miss. 410, 29 So.2d 96. There was evidence that for thirty years no Negroes had appeared on a jury. It appears that the Mississippi statute, unlike the Alabama statute, requires that a juror also be an elector. Negroes were shown to be registered poll tax paying voters. No evidence explained their absence from the venires. Cf. United States ex rel. Goldsby v. Harpole, supra, note 6.

Cassell v. State of Texas, 1950, 339 U.S. 282, 70 S.Ct. 629, 632, 94 L.Ed. 839, reversing 154 Tex.Cr.R. 648, 216 S.W.2d 813. Testimony showed that the jury commissioners of Dallas County, Texas, had taken the affirmance of Akins v. State of Texas, supra, to mean that the inclusion of one

Negro, no more and no less, did not mar indictment of a Negro by a grand jury so composed as denying equal protection. The majority opinion considered the commissioners were under a duty to familiarize themselves with the eligible jurors. In view of the size of the population of Dallas County, it was assumed that a large proportion of the Negroes were eligible. The majority said proportional limitation is no more permissible than is proportional representation mandatory. There must be "neither inclusion nor exclusion because of race."

In Avery v. State of Georgia, 1953, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244, there was a drawing from a jury box containing white and yellow tickets. The white tickets were for members of the white race and the yellow for Negroes. This system was held to be prima facie evidence of discrimination, and it mattered not that the judge who drew the tickets in no way chose between white and yellow.

Brown v. Allen (Speller v. Allen, Daniels v. Allen), 1953, 344 U.S. 443, 73 S.Ct. 397, 417, 97 L.Ed. 469. (Habeas corpus denied to examine North Carolina sentences after exhaustion of State procedure.)

In the Brown case confinement of the selection of jurors for grand and petit juries to taxpayers in Forsyth County was held not to be discriminatory per se.

In the Speller case the fact that there were dots on scrolls bearing the names of Negroes was held to be immaterial. "The jury box was produced in court, opened, and counsel for defendant permitted to examine the scrolls." The selection of the venire was made by a child's drawing the names from the box. The court, in referring to the undisputed prior exclusion, stated (344 U.S. at page 479, 73 S.Ct. at page 418):

> "* * * Former errors cannot invalidate future trials. * * *"

Hernandez v. State of Texas, 1954, 347 U.S. 475, 74 S.Ct. 667, 671, 98 L.Ed. 866, reversing 160 Tex.Cr.R. 72, 251 S.W.2d 531. A motion to quash the indictment and the jury panel because of the systematic exclusion of persons of Mexican descent from (a) jury commissioners, (b) grand jurors, and (c) petit jurors. The court, per Warren, C. J., referred to the pattern of proof in Norris v. State of Alabama, supra, and described this as the "rule of exclusion," which the State had not explained as due to circumstance or chance.

Reece v. State of Georgia, 1955, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77, reversing 211 Ga. 339, 85 S.E.2d 773, is a preliminary procedure case companion to Michel v. State of Louisiana, supra, and turns more on the due process clause for decision, although the question raised in the court below, which was overruled for procedural reasons, was one coming under a charge of systematic exclusion of Negroes from the grand jury. The ratio decidendi of this case affords no precedent here.

In Eubanks v. State of Louisiana, 1958, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991, reversing 232 La. 289, 94 So.2d 262, there was a motion to quash the indictment because of the systematic exclusion of Negroes from the grand jury in Orleans Parish. The system of selection resembled that in Pierre v. State of Louisiana, supra, in that a jury commission selects the names of not less than 750 persons competent to serve as jurors. From this list the commission semi-annually draws the names of seventy-five persons. A judge of the criminal court picks a twelve-man grand jury from these seventy-five. The court said (356 U.S. at page 586, 78 S.Ct. at page 972):

> "* * * Obviously the judges have broad discretion in selecting from the list * * * Several of them interview a substantial number of prospective jurors before making their choice. Others, including the judge

who chose the jury that tried petitioner, testified that they usually selected on the basis of personal knowledge or reputation in the community. Petitioner does not challenge this system of choosing grand jurors, as such, but he does contend that it has been administered by the local judges so that * * * (Negroes) have been systematically excluded * * *"

The court continued (356 U.S. at page 587, 78 S.Ct. at page 973):

"* * * We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the list submitted to the various local judges. * * *"

An analysis of the statutory method of picking jurors shows that the Alabama statutory scheme compares most nearly to that shown in the North Carolina case of Speller v. Allen, supra.

We have here no question of statutory exclusion, directly or indirectly. We do not require jurors, even those who cannot read or write English, to be property owers. We do not require jurors to be registered voters.

However, our statutes and decisions are replete with qualitative standards to bar those convicted of various felonies, misdemeanor and municipal offenses. The jury statutes probably also confer far too many occupational exemptions.[1]

The only opportunities, under the Alabama statute, for a system of exclusion to operate would be either in (a)

[1] Jones, Trial by Jury in Alabama, 8 Ala.L.Rev. 274.

fraudulent drawings from the jury box for the venire or from the hat (or box) in picking a grand jury panel, or (b) a deliberate wilful passing over all qualified Negroes in making up the original list.

It is noteworthy in this case that Anderson did not, as did Norris in Norris v. State of Alabama, supra, make any attempt to produce the jury rolls in open court so that they might be examined for the presence or absence of Negroes.

Indeed, the State's evidence undisputedly showed that there were Negroes on the jury rolls. There was uncontroverted testimony that each venire contained an average maximum of seven to eight Negroes.

[15] In noncapital criminal cases, it is within the province of the trial judge to excuse jurors from service on petit juries (Draper v. State, 250 Ala. 679, 36 So.2d 73), and the same rule obtains in the selection of grand juries.

[16] That in the last five years Negroes have, in many instances, asked to be excused from jury service in Dallas County, is not a showing of any action on the part of the State of Alabama or any of its officials to exclude them from juries.

[17] The record does not show how the State and the defendant chose to exercise the strikes as to the array for the petit jury. See Code 1940, T. 30, § 60, as to striking jurors in noncapital criminal cases; § 64, capital cases. If this were to have been made a point upon appeal, the record could and should have been required so to show. Vernon v. State, 245 Ala. 633, 636, 18 So.2d 388.

Unlike Texas or Louisiana, the members of a grand jury are not selected vis-a-vis any official of the State other than upon their first going upon the roll. Our trial judge, after hearing requests for excuses, has the names of all

the veniremen placed in a hat or box and then proceeds to draw names.

No allegation is made in this case that there was any form of selection other than by lot. There was nothing such as white and yellow cards or "marked decks," so that no question arises as to the drawing of the venire or of the grand jurors from the hat or box. This results then in leaving open as the only point of enquiry whether or not the jury commissioners have any system or scheme for excluding Negroes from the rolls.

[18] We consider the trial judge did not abuse the discretion confided in him and came to a reasonable conclusion based on substantial evidence. Among our reasons for so believing are:

[19] 1. The trial judge was entitled to take judicial knowledge of the size of the jury roll, which was testified to comprise some 1800 names, from his acquaintance therewith in drawing from the jury wheel or box for the various venires. This knowledge also was available to him from the published opinion of our Supreme Court in the Fikes case in which it was pointed out that of some 1500 names on the jury list at that time 250 to 300 were of Negroes.

[20] 2. The trial judge was entitled to take judicial knowledge of the existence of the names of Negroes on the jury roll from the fact that Negroes appeared on the venires attending the court in substantial numbers.

3. That the ration of white jurors to Negro jurors should be greater than in proportion to the ration of white men to Negro men because of, among other pertinent factors, the undisputed evidence of a greater number of arrests of Negroes by the law enforcement officers of Dallas County and the city of Selma. Even with an allowance for re-

peaters, substantially more (and out of population proportion) of the persons arrested were Negroes.

4. The trial judge was entitled to consider from his own knowledge as presiding judge over trials of felonies and misdemeanors as to the proportion of persons convicted as between white and Negro defendants, a matter on which no evidence was offered by either side.

5. The trial judge was entitled to take into consideration the failure of Anderson to establish any coercion or inducement on the part of any state, country, or local official or of any conduct condoned by them which would cause Negroes to seek to excuse themselves from jury duty in Dallas County, Alabama.

6. The trial judge was entitled to take into consideration the failure of Anderson to ask for the production of the jury rolls themselves for examination in open court. The Alabama law generally prefers as evidence where possible that which admits of less argument and dispute, and the jury rolls themselves would have afforded a much more authoritative solution than is given by hearsay and repute.[8]

We feel all and all in balance that Anderson has failed to carry the burden of proof that there is any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excludes or limits the number of Negroes available for jury service in Dallas County, Alabama.

Accordingly, the judgment below is due to be Affirmed.

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[8] Shepherd v. Sartain, 185 Ala. 439, 64 So. 57; Code 1940, T. 30, § 20, as amended, last sentence; State ex. rel. Denson v. Miller, 204 Ala. 234, 85 So. 700; Norris v. State of Alabama, supra.

Judgment of the Circuit Court

CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
DALLAS COUNTY, ALABAMA

February 27, 1959.

Comes the State of Alabama, by its solicitors and also comes the defendant Lewis Lloyd Anderson in his own proper person and by and with his attorneys, and being duly and legally arraigned in open court upon the indictment in this cause, for answer to said indictment, pleads and says that he is not guilty in manner and form as charged therein; and issue joined:

Thereupon came a jury of good and lawful men, to wit: Paul M. Friday, and 11 others, who having been impaneled and duly sworn according to law, on their oaths say,

> "We the jury find the defendant guilty of manslaughter in the first degree as charged in the indictment, and fix his punishment at imprisonment in the penitentiary of Alabama for 10 years. Paul M. Friday, Foreman."

SENTENCE

And now on this day to wit: February 27, 1959, the defendant, Lewis Lloyd Anderson, being personally present in open court and being attended by his attorneys was asked by the court if he had anything to say why the sentence of the law should not be pronounced upon him. And he said, "I do not think I got justice." It is therefore considered and adjudged accordingly by the court that the defendant is guilty

of manslaughter in the first degree as charged in the indictment and as punishment for said offense the defendant is sentenced to imprisonment in the penitentiary of Alabama for 10 years.

ORDER OF THE COURT

February 27, 1959. The defendant in open court gave notice of and takes an appeal in this cause to the Court of Appeals in Alabama and on motion of the defendant made in open court the sentence in this cause is suspended pending said appeal, and the defendant's appeal bond, is fixed by the court at the sum of $3,000 to be continued as is required by law.

/s/ L. S. MOORE
Judge

Opinion of the Alabama Supreme Court

LEWIS LLOYD ANDERSON

v.

STATE OF ALABAMA.

2 Div. 411.

Supreme Court of Alabama.

March 17, 1960.

Rehearing Denied, May 19, 1960.

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GOODWYN, Justice.

The appellant in the Court of Appeals has petitioned us for a writ for certiorari to review the opinion and decision of that court in the case of Anderson v. State of Alabama, 120 So.2d 397.

Petitioner avers in his petition "that he has filed his application for rehearing in said Court of Appeals, within the time required by law, and that said application for rehearing in the Court of Appeals was overruled on the first day of December, 1959." The State has filed a motion to strike the petition on the ground that it fails to comply with Rule 39 of the Revised Rules of the Supreme Court, Code 1940, Tit. 7 Appendix, "in that there does not appear on the face of the application for certiorari that application has been made to the Court of Appeals for a rehearing *of the point or decision complained of*, but merely shows that an application for a rehearing was made in the Court of Appeals."

Rule 39 provides that an application for the writ of certiorari to the Court of Appeals will not be entertained

or considered, "unless it appears upon the face of the application therefor that application has been made to said court of appeals for a rehearing *of the point or decision complained of*, * * *." (Emphasis supplied.)

The provisions of Revised Rule 39 (formerly Rule 44) have been in effect for many years. From the wording of the rule it is not clear what was intended by requiring that the application for certiorari show on its face that a rehearing has been sought in the Court of Appeals "of the point or decision complained of." There is some basis for construing it as requiring a reconsideration by the Court of Appeals of the specific points presented for review on certiorari as a prerequisite to a review of such points by the Supreme Court. However, it has not been so construed by this court. We have consistently considered petitions for certiorari when it is shown that there has been an application for a rehearing of the case in the Court of Appeals and a denial of rehearing by that court. While, in reviewing an opinion and decision of the Court of Appeals, we have limited our review to the points included in the petition for certiorari and insisted on in brief, we have not required, as a requisite to jurisdiction, a showing that the specific points included in the petition for certiorari must first have been presented on rehearing in the Court of Appeals.

The motion to strike is denied. All the Justices concur.

On consideration of the petition for certiorari, our conclusion is that the writ is due to be denied.

Writ denied.

SIMPSON, STAKELY and MERRILL, JJ., concur.

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